



6450-01-P

DEPARTMENT OF ENERGY

10 CFR Part 810

RIN 1994-AA05

Assistance to Foreign Atomic Energy Activities

AGENCY: National Nuclear Security Administration (NNSA), Department of Energy (DOE).

ACTION: Notice of proposed rulemaking.

SUMMARY: DOE proposes procedures for the imposition of civil penalties for violations of the provisions of the Atomic Energy Act of 1954 (AEA) that restrict participation by U.S. persons in the development or production of special nuclear material outside of the United States. This proposed rule provides procedures to implement a statutory amendment contained within the *John S. McCain National Defense Authorization Act for Fiscal Year 2019*.

DATES: Comments on this proposed rulemaking must be received on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

ADDRESSES: You may submit comments, identified by RIN 1994-AA05, by any of the following methods:

1. *Federal Rulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
2. *E-mail:* Part810@nnsa.doe.gov. Include RIN 1994-AA05 in the subject line of the message.

3. *Mail:* Katie Strangis, Office of Nonproliferation and Arms Control, NA-24, National Nuclear Security Administration, Department of Energy, 1000 Independence Avenue, SW, Washington, DC 20585.

Due to potential delays in DOE's receipt and processing of mail sent through the U.S. Postal Service, DOE encourages responders to submit comments electronically to ensure timely receipt.

All submissions must include the RIN for this rulemaking, RIN 1994-AA05. For detailed instructions on submitting comments and additional information on the rulemaking process, see the "**Public Comment Procedures**" heading of the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Ms. Katie Strangis, Senior Policy Advisor, Office of Nonproliferation and Arms Control (NPAC), National Nuclear Security Administration, Department of Energy, 1000 Independence Avenue, SW, Washington, DC 20585, telephone (202) 586-8623 or e-mail:

Katie.Strangis@nnsa.doe.gov; Mr. Thomas Reilly, Office of the General Counsel, GC-53, Department of Energy, 1000 Independence Avenue, SW, Washington, DC 20585, telephone (202) 586-3417; or Mr. Zachary Stern, Office of the General Counsel, National Nuclear Security Administration, Department of Energy, 1000 Independence Avenue, SW, Washington, DC 20585, telephone (202) 586-8627.

SUPPLEMENTARY INFORMATION:

I. Introduction

II. Discussion of the Proposed Rule

III. Public Comment Procedures

IV. Regulatory Review

V. Approval of the Office of the Secretary

I. Introduction

DOE's 10 CFR part 810 regulation (Part 810) implements section 57 b.(2) of the AEA (42 U.S.C. 2077), as amended. Part 810 controls the export of unclassified nuclear technology and assistance. It enables peaceful nuclear trade by helping to ensure that nuclear technologies exported from the United States will not be used for non-peaceful purposes. Part 810 controls the export of nuclear technology and assistance by identifying some activities as "generally authorized" by the Secretary of Energy (Secretary), thereby requiring no further authorization under Part 810 by DOE prior to engaging in such activities. For activities and/or destinations that are not generally authorized, Part 810 requires a "specific authorization" by the Secretary. Part 810 also details a process to apply for specific authorization from the Secretary and specifies the reporting requirements for generally and specifically authorized activities subject to Part 810. Violations of section 57 b. of the AEA and Part 810 may result in revocation, suspension, or modification of authorizations, pursuant to 10 CFR 810.10, as well as criminal penalties, pursuant to 10 CFR 810.15.

Section 3116(b) of the *John S. McCain National Defense Authorization Act for Fiscal Year 2019* (NDAA), Public Law 115-232, amended section 234 a. of the AEA (42 U.S.C. 2282(a)) to clarify DOE's authority to impose civil penalties for violations of section 57 b. of the AEA, as implemented under Part 810. This proposed rule would update Part 810 to include new procedures to implement this authority.

II. Discussion of the Proposed Rule

The goals of the Part 810 enforcement program are to deter illicit transfers of U.S. nuclear technology and assistance controlled under Part 810, to encourage full and accurate compliance with the reporting requirements, and to incentivize prompt self-reporting of regulatory violations. Civil penalties are a useful tool in attaining those objectives, and DOE is authorized to impose civil penalties under section 234 a. of the AEA (42 U.S.C. 2282(a)). Section 234 a., as amended by section 3116(b) of the NDAA provides in part that persons that violate any provision of section 57 are subject to a civil penalty.

This proposed rule would update 10 CFR 810.1 to identify specification of civil penalties and enforcement procedures as a purpose of the Part 810 regulation. This proposed rule would also update 10 CFR 810.15 to include procedures to implement DOE's civil penalty authority. It would establish procedures for DOE to impose a penalty not to exceed an amount identified by Congress and adjusted by the *Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015*. This amount is to be annually adjusted pursuant to the *Federal Civil Penalties Inflation Adjustment Act of 1990*, 28 U.S.C. 2461.

The authority to impose civil penalties for violations of section 57 b. of the AEA as implemented under Part 810 was provided by section 3116(b) of the NDAA for FY 2019, which amended section 234 a. of the AEA. Section 234 a. listed statutory provisions the violation of which would subject a person to an express civil penalty referencing an amount identified in section 234a. of the AEA. Separately, every Federal agency is required by law to adjust annually civil monetary penalties to account for inflation.

Congress identified the upper bound penalty amount to be consistent with section 234a. of the AEA, which set the maximum penalty for a number of violations at \$100,000, prior to enactment of the *Federal Civil Penalties Inflation Adjustment Act of 1990* or the *Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015*. DOE intends to apply the inflation adjustment to the section 234a. base amount of \$100,000 and then to the extent permitted by law apply the catch-up adjustment required under OMB Memorandum M-16-06, the Federal guidance to implement the *Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015*. Subsequent adjustments would be made following OMB Memoranda M-17-11, M-18-03, and M-19-04 for a maximum penalty of \$265,815.

Congress did not specifically change the amount of the allowable maximum penalty, as it did in previous amendments. There may be a question of whether Congress desired a lower maximum civil penalty amount to apply. An alternative approach would be to start with the statutory base amount of \$100,000 as defined in section 234a. as amended and apply the 2019 inflation adjustment according to OMB Memorandum M-19-04 bringing it to \$102,522.

Pursuant to section 234 a. of the AEA, as amended, (42 U.S.C. 2282(a)), this civil penalty is to be imposed per violation, and if a violation is a continuing one, each day from the point at which the violating activity began to the point at which the violating activity was suspended constitutes a separate violation for purposes of computing the civil penalty. The mere act of suspending an activity does not constitute admission that the activity was in violation of the Part 810 regulation, and does not waive the rights and

processes outlined in paragraphs (c)(4) through (c)(14) of the proposed rule or otherwise impact the right of the person to appeal any civil penalty that may be imposed.

The proposed rule would require DOE to give the person subject to the penalty notice of the violation and the proposed penalty, would provide the person an opportunity to respond to the notice and demonstrate why a proposed penalty should not be imposed, and would establish the process for a decision by the Deputy Administrator for Defense Nuclear Nonproliferation within DOE's National Nuclear Security Administration. It would also provide for an opportunity for a hearing and a subsequent final decision by the DOE Under Secretary for Nuclear Security.

The proposed rule would require the Deputy Administrator for Defense Nuclear Nonproliferation or his/her designee to notify the person subject to the penalty, by a written notice of violation sent by registered or certified mail to the last known address of such person, of: the date, facts, and nature of each act or omission with which the person is charged; the particular provision or provisions of section 57 b. of the AEA, as implemented under Part 810, involved in each alleged violation; the penalty which DOE proposes to impose; the opportunity of the person to submit a written reply within 30 calendar days of receipt of such preliminary notice of violation showing why such penalty should not be imposed; and the possibility of collection by civil action upon failure to pay the civil penalty.

The proposed rule would require that a reply to a notice of violation: state any facts, explanations, and arguments which support a denial of the alleged violation; demonstrate any extenuating circumstances or other reason why a proposed penalty should not be imposed or should be mitigated; discuss the relevant authorities which

support the position asserted; furnish full and complete answers to any questions set forth in the notice of violation; and include copies of all relevant documents. DOE guidance regarding self-disclosures of violations of Part 810 is set forth on the Part 810 website (<https://www.energy.gov/nnsa/10-cfr-part-810>), under “Part 810 Frequently Asked Questions,” and specifies that self-disclosures must be made via e-mail to *Part810@nnsa.doe.gov* within 30 days of becoming aware of a violation or potential violation of Part 810, and that when considering instances of actual or potential violations, DOE will take into account whether the violation in question was self-reported.

The proposed rule provides that if a person fails to submit a written reply within 30 calendar days of receipt of a notice of violation, the notice of violation, including any penalties therein, would constitute a final decision, and payment of the full amount of the civil penalty assessed in the notice of violation would be due 30 calendar days after receipt of the notice of violation. Such failure to submit a reply would constitute a waiver of the rights and processes outlined in paragraphs (c)(4) through (c)(14) of the proposed rule.

The proposed rule provides that the Deputy Administrator for Defense Nuclear Nonproliferation or designee, at the written request of a person notified of an alleged violation, may extend in writing, for a reasonable period, the time for submitting a reply.

The proposed rule provides that if a person submits a timely written reply to the notice of violation, the Deputy Administrator for Defense Nuclear Nonproliferation would make a final determination whether the person violated or is continuing to violate a requirement of section 57 b., as implemented by Part 810. Based on a determination

that a person has violated or is continuing to violate such a requirement, the Deputy Administrator for Defense Nuclear Nonproliferation may issue to that person a final notice of violation that concisely states the violation, the amount of the civil penalty imposed, further actions necessary by or available to the person, and that upon failure to timely pay the civil penalty, the penalty may be collected by civil action. The Deputy Administrator for Defense Nuclear Nonproliferation would send such a final notice of violation by registered or certified mail to the last known address of the person.

The amount of a civil penalty assessed under this proposed rule would be based on: the nature, circumstances, extent, and gravity of the violation(s); the violator's ability to pay; the effect of the civil penalty on the person's ability to do business; any history of prior violations; the degree of culpability; whether the violator self-disclosed the violation; the economic significance of the violation; and such other matters as justice may require.

Pursuant to proposed §810.15(c)(6), any person who receives a final notice of violation following submission of a timely written reply to the original notice of violation may request a hearing concerning the allegations contained in the notice. The person would be required to mail or deliver any written request for a hearing to the Under Secretary for Nuclear Security within 30 calendar days of receipt of the final notice of violation. If the person does not request a hearing within 30 calendar days, the final notice of violation, including any penalties therein, would constitute a final decision and payment of the full amount of the civil penalty assessed would be due 45 calendar days after receipt of the final notice of violation.

Upon receipt from a person of a written request for a hearing, the Under Secretary for Nuclear Security or his/her designee would appoint a Hearing Counsel and forward the request for a hearing to the DOE Office of Hearings and Appeals (OHA). The OHA Director would appoint an OHA Administrative Judge. Under proposed §810.15(c)(8), the Hearing Counsel shall be an attorney employed by DOE and shall have all powers necessary to represent DOE before OHA.

Pursuant to proposed §810.15(c)(9), in all hearings under the proposed rule, the parties have the right to be represented by a person of their choosing, subject to possessing an appropriate information access authorization for the subject matter, and would be responsible for producing witnesses on their behalf, including requesting the issuance of subpoenas, if necessary. Testimony of witnesses would be given under oath or affirmation, and witnesses must be advised of the applicability of 18 U.S.C. 1001 and 1621, dealing with the criminal penalties associated with false statements and perjury. Witnesses would be subject to cross-examination. Formal rules of evidence would not apply, but OHA may use the Federal Rules of Evidence as a guide. A court reporter would make a transcript of the hearing.

In addition, pursuant to proposed §810.15(c)(9), the Administrative Judge would have all powers necessary to regulate the conduct of proceedings: (i) the Administrative Judge may order discovery at the request of a party, based on a showing that the requested discovery is designed to produce evidence regarding a matter, not privileged, that is relevant to the subject matter of the complaint; (ii) the Administrative Judge may permit parties to obtain discovery by any appropriate method, including deposition upon oral examination or written questions; written interrogatories; production of documents or

things; permission to enter upon land or other property for inspection and other purposes; and requests for admission; (iii) the Administrative Judge may issue subpoenas for the appearance of witnesses on behalf of either party, or for the production of specific documents or other physical evidence; (iv) the Administrative Judge may rule on objections to the presentation of evidence; exclude evidence that is immaterial, irrelevant, or unduly repetitious; require the advance submission of documents offered as evidence; dispose of procedural requests; grant extensions of time; determine the format of the hearing; direct that written motions, documents, or briefs be filed with respect to issues raised during the course of the hearing; ask questions of witnesses; direct that documentary evidence be served upon other parties (under protective order if such evidence is deemed confidential); and otherwise regulate the conduct of the hearing; (v) the Administrative Judge may, at the request of a party or on his or her own initiative, dismiss a claim, defense, or party and make adverse findings upon the failure of a party or the party's representative to comply with a lawful order of the Administrative Judge, or, without good cause, to attend a hearing; (vi) the Administrative Judge, upon request of a party, may allow the parties a reasonable time to file pre-hearing briefs or written statements with respect to material issues of fact or law. Any pre-hearing submission must be limited to the issues specified and filed within the time prescribed by the Administrative Judge; (vii) the parties are entitled to make oral closing arguments, but post-hearing submissions are only permitted by direction of the Administrative judge; (viii) Parties allowed to file written submissions, or documentary evidence must serve copies upon the other parties within the timeframe prescribed by the Administrative Judge; (ix) the Administrative Judge is prohibited, beginning with his or her appointment

and until a final agency decision is issued, from initiating or otherwise engaging in ex parte (private) discussions with any party on the merits of the complaint; (x) the Administrative Judge is responsible for determining the date, time, and location of the hearing, including whether the hearing will be conducted via video conference; and (xi) the Administrative Judge shall convene the hearing within 180 days of the OHA's receipt of the request for a hearing, unless the parties agree to an extension of this deadline by mutual written consent, or the Administrative Judge determines that extraordinary circumstances exist that require a delay.

Under proposed §810.15(c)(10), hearings shall be open only to Hearing Counsel, duly authorized representatives of DOE, the person subject to the penalty and the person's counsel or other representatives, and such other persons as may be authorized by the Administrative Judge. Unless otherwise ordered by the Administrative Judge, witnesses shall testify in the presence of the person subject to the penalty but not in the presence of other witnesses.

Pursuant to proposed §810.15(c)(11), the Administrative Judge must use procedures appropriate to safeguard and prevent unauthorized disclosure of classified information or any other information protected from public disclosure by law or regulation, with minimum impairment of rights and obligations under this part. The classified or otherwise protected status of any information shall not, however, preclude its being introduced into evidence. The Administrative Judge may issue such orders as may be necessary to consider such evidence in camera including the preparation of a supplemental recommended decision to address issues of law or fact that arise out of that portion of the evidence that is classified or otherwise protected.

The proposed rule provides that the person requesting the hearing has the burden of going forward and of demonstrating that the decision to impose the civil penalty is not supported by substantial evidence.

The proposed rule provides that within 180 days of receiving a copy of the hearing transcript, or the closing of the record, whichever is later, the Administrative Judge shall issue a recommended decision. The recommended decision shall contain findings of fact and conclusions regarding all material issues of law, as well as the reasons therefor. If the Administrative Judge determines that a violation has occurred and that a civil penalty is appropriate, the recommended decision shall set forth the amount of the civil penalty based on the factors in §810.15(c)(5) of the proposed rule.

Pursuant to proposed §810.15(c)(14) the Administrative Judge shall forward the recommended decision to the Under Secretary for Nuclear Security. The Under Secretary for Nuclear Security shall make a final decision as soon as practicable after completing his/her review. This may include compromising, mitigating, or remitting the penalties in accordance with section 234 a. of the AEA, as amended. DOE would notify the person of the Under Secretary for Nuclear Security's final decision or other action under this paragraph in writing by certified mail, return receipt requested. The person against whom the civil penalty is assessed by the final decision would be required to pay the full amount of the civil penalty assessed in the final decision within 30 calendar days unless otherwise determined by the Under Secretary for Nuclear Security.

The proposed rule at paragraph (c)(15) provides that if a civil penalty assessed in a final decision is not paid as provided in §810.15(c)(3), (c)(6) or (c)(14), as appropriate, the Under Secretary for Nuclear Security may request the Department of Justice to

initiate a civil action to collect the penalty imposed under this paragraph in accordance with section 234 c. of the AEA, as amended.

Pursuant to proposed §810.15(c)(16), the Under Secretary for Nuclear Security or his/her designee may publish redacted versions of notices of violation and final decisions.

III. Public Comment Procedures

Interested persons are invited to submit comments on this regulatory proposal. Written comments should be submitted to the address indicated in the **ADDRESSES** section of this proposed rule. All comments submitted in writing or in electronic form may be made available to the public in their entirety. Personal information such as your name, address, telephone number, e-mail address, etc., will not be removed from your submission. Comments will be available for public inspection at <http://www.regulations.gov>.

If you submit information that you believe to be exempt by law from public disclosure, you should submit one complete copy, as well as one copy from which the information claimed to be exempt by law from public disclosure has been deleted. DOE is responsible for the final determination with regard to disclosure or nondisclosure of the information and for treating it accordingly under the DOE Freedom of Information regulations at 10 CFR 1004.11.

IV. Regulatory Review

A. Executive Order 12866

The proposed rule has been determined to be a significant regulatory action under Executive Order 12866, “Regulatory Planning and Review,” 58 FR 51735 (October 4, 1993). Accordingly, this action was subject to review under that Executive Order by the

Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget (OMB).

B. National Environmental Policy Act

DOE has determined that the proposed rule is covered under the Categorical Exclusion found in DOE's National Environmental Policy Act regulations at paragraph A5 of Appendix A to Subpart D, 10 CFR part 1021, which applies to a rulemaking that amends an existing rule or regulation and that does not change the environmental effect of the rule or regulation being amended. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, "Proper Consideration of Small Entities in Agency Rulemaking," 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process (68 FR 7990). DOE has made its procedures and policies available on the Office of the General Counsel's website:

<https://www.energy.gov/gc/office-general-counsel>.

This proposed rule would update 10 CFR 810.15 to include procedures for the imposition of civil penalties. DOE has reviewed the proposed changes under the provisions of the *Regulatory Flexibility Act* and the procedures and policies published on

February 19, 2003. The proposed changes do not expand the scope of activities currently regulated under 10 CFR part 810.

DOE has conducted a review of the potential small businesses that may be impacted by this proposed rule. This review consisted of an analysis of the number of businesses impacted generally in Fiscal Years 2016 and 2017, and a determination of which of those are considered “small businesses” by the Small Business Administration. Small businesses impacted by Part 810 generally fall within two North American Industry Classification System codes: engineering services (541330) and computer systems designs services (541512). Often, their requests for authorization include the transfer of computer codes or other similar products. A total of 89 businesses and other entities submitted reports and applications pursuant to the regulation during this time period. DOE estimates that approximately 10% of those entities impacted by Part 810 are small businesses. As such, of those 89 entities that submitted reports and applications under Part 810, approximately 9 are estimated to be small businesses.

Small businesses exporting nuclear technology like all other regulated entities, would be subject to civil penalties for violations of Part 810. Further, the requirements for small businesses exporting nuclear technology would not substantively change because the proposed revisions to this rule do not add new burdens or duties to small businesses. The obligations of any person subject to the jurisdiction of the United States who engages or participates directly or indirectly in the production of special nuclear material outside the United States have not changed in a manner that would provide any significant economic impact on small businesses. Because the proposed changes to this rule would not alter the businesses’ standards or processes for receiving Part 810

authorization, there would be no impact on these businesses' ability to comply with Part 810 in the same manner they have previously.

On the basis of the foregoing, DOE certifies that the proposed rule would not have a significant economic impact on a substantial number of small entities.

Accordingly, DOE has not prepared a regulatory flexibility analysis for this proposed rulemaking. DOE's certification and supporting statement of factual basis will be provided to the Chief Counsel for Advocacy of the Small Business Administration pursuant to 5 U.S.C. 605(b).

D. Paperwork Reduction Act

The collection of information requirements have been approved under OMB Control Number 1901-0263. The proposed rule would provide procedures for imposing civil penalties for a violation of Part 810. There would be no collection of information under the proposed rule.

E. Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector. Pub. L. No. 104-4, sec. 201 (codified at 2 U.S.C. 1531). For regulatory actions likely to result in a rule that may cause the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector of \$100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy (2 U.S.C. 1532(a),(b)). UMRA also requires a Federal agency to develop an effective process to

permit timely input by elected officers of State, local, and tribal governments on a “significant intergovernmental mandate,” and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect them. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. 62 FR 12820. (This policy is also available at <http://energy.gov/gc/office-general-counsel>.) DOE examined this proposed rule according to UMRA and its statement of policy and has determined that the rule contains neither an intergovernmental mandate, nor a mandate that may result in the expenditure by State, local, and tribal government, in the aggregate, or by the private sector, of \$100 million or more in any year. Accordingly, no further assessment or analysis is required under UMRA.

F. Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, “Civil Justice Reform” 61 FR 4729 (February 7, 1996), imposes on Executive agencies the general duty to adhere to the following requirements: (1) eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. With regard to the review required by section 3(a), section 3(b), Executive Order 12988 specifically requires that Federal agencies make every reasonable effort to ensure that the regulation: (1) clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct

while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met, or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that to the extent permitted by law, this proposed rule meets the relevant standards of Executive Order 12988.

G. Executive Order 13132

Executive Order 13132, “Federalism,” 64 FR 43255 (August 4, 1999) imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and carefully assess the necessity for such actions. DOE has examined this proposed rule and has determined that it would not preempt State law and would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. No further action is required by Executive Order 13132.

H. Treasury and General Government Appropriations Act, 1999

Section 654 of the *Treasury and General Government Appropriations Act, 1999* (Pub. L. 105-277) requires Federal agencies to issue a Family Policymaking Assessment for any proposed rule that may affect family well-being. The proposed rule would have

no impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

I. Executive Order 13211

Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy, Supply, Distribution, or Use,” 66 FR 28355 (May 22, 2001) requires Federal agencies to prepare and submit to OMB a Statement of Energy Effects for any proposed significant energy action. A “significant energy action” is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that: (1) is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use. This proposed regulatory action would not have a significant adverse effect on the supply, distribution, or use of energy and is therefore not a significant regulatory action. Accordingly, DOE has not prepared a Statement of Energy Effects.

J. Treasury and General Government Appropriations Act, 2001

The Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB’s guidelines were published at 67 FR 8452 (February 22, 2002), and

DOE's guidelines were published at 67 FR 62446 (October 7, 2002). DOE has reviewed today's proposed rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

K. Executive Orders 13771, 13777, and 13783

On January 30, 2017, the President issued Executive Order 13771, "Reducing Regulation and Controlling Regulatory Costs." That Order stated the policy of the executive branch is to be prudent and financially responsible in the expenditure of funds, from both public and private sources. The Order stated it is essential to manage the costs associated with the governmental imposition of private expenditures required to comply with Federal regulations.

Additionally, on February 24, 2017, the President issued Executive Order 13777, "Enforcing the Regulatory Reform Agenda." The Order required the head of each agency designate an agency official as its Regulatory Reform Officer (RRO). Each RRO oversees the implementation of regulatory reform initiatives and policies to ensure that agencies effectively carry out regulatory reforms, consistent with applicable law. Further, EO 13777 requires the establishment of a regulatory task force at each agency. The regulatory task force is required to make recommendations to the agency head regarding the repeal, replacement, or modification of existing regulations, consistent with applicable law. At a minimum, each regulatory reform task force must attempt to identify regulations that:

- (i) Eliminate jobs, or inhibit job creation;
- (ii) Are outdated, unnecessary, or ineffective;
- (iii) Impose costs that exceed benefits;

- (iv) Create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies;
- (v) Are inconsistent with the requirements of *Information Quality Act*, or the guidance issued pursuant to that Act, in particular those regulations that rely in whole or in part on data, information, or methods that are not publicly available or that are insufficiently transparent to meet the standard for reproducibility; or
- (vi) Derive from or implement Executive Orders or other Presidential directives that have been subsequently rescinded or substantially modified.

Finally, on March 28, 2017, the President signed Executive Order 13783, entitled “Promoting Energy Independence and Economic Growth.” Among other things, EO 13783 requires the heads of agencies to review all existing regulations, orders, guidance documents, policies, and any other similar agency actions (collectively, agency actions) that potentially burden the development or use of domestically produced energy resources, with particular attention to oil, natural gas, coal, and nuclear energy resources. Such review does not include agency actions that are mandated by law, necessary for the public interest, and consistent with the policy set forth elsewhere in that order.

Executive Order 13783 defined burden for purposes of the review of existing regulations to mean to unnecessarily obstruct, delay, curtail, or otherwise impose significant costs on the siting, permitting, production, utilization, transmission, or delivery of energy resources.

DOE concludes that this proposed rule is consistent with the directives set forth in these executive orders. This proposed rule is not expected to impose a new regulatory

burden, because U.S. persons are already required to comply with Part 810. The proposed rule would merely detail procedures that DOE would follow in the event that section 57 b.(2) of the AEA (42 U.S.C. 2077(b)(2)) and implementing regulations at Part 810 are violated.

V. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this proposed rule.

List of Subjects in 10 CFR Part 810

Foreign relations, Nuclear energy, Reporting and recordkeeping requirements.

Signed in Washington, DC on September 20, 2019.

Rick Perry
Secretary of Energy

For the reasons set forth in the preamble, the Department of Energy proposes to amend part 810 of chapter III, title 10 of the Code of Federal Regulations as set forth below.

PART 810--ASSISTANCE TO FOREIGN ATOMIC ENERGY ACTIVITIES

1. The authority citation for part 810 is revised to read as follows:

Authority: Secs. 57, 127, 128, 129, 161, 222, 232, and 234 AEA, as amended by the *Nuclear Nonproliferation Act of 1978*, Pub. L. 95-242, 68 Stat. 932, 948, 950, 958, 92 Stat. 126, 136, 137, 138 (42 U.S.C. 2077, 2156, 2157, 2158, 2201, 2272, 2280, 2282), the

Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. 108-458, 118 Stat. 3768, and sec. 3116 of the *John S. McCain National Defense Authorization Act for Fiscal Year 2019*, Pub. L. 115-232; Sec. 104 of the *Energy Reorganization Act of 1974*, Pub. L. 93-438; Sec. 301, *Department of Energy Organization Act*, Pub. L. 95-91; *National Nuclear Security Administration Act*, Pub. L. 106-65, 50 U.S.C. 2401 *et seq.*, as amended.

2. Section 810.1 is amended by adding paragraph (d) to read as follows:

§810.1 Purpose.

* * * * *

(d) Specify civil penalties and enforcement proceedings.

3. Section 810.15 is amended by adding paragraph (c) to read as follows:

§810.15 Violations.

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(c) In accordance with section 234 of the AEA, any person who violates any provision of section 57 b. of the AEA, as implemented under this part, shall be subject to a civil penalty, not to exceed \$102,522 per violation. If any violation is a continuing one, each day from the point at which the violating activity began to the point at which the violating activity was suspended shall constitute a separate violation for the purpose of computing the applicable civil penalty. The mere act of suspending an activity does not constitute admission that the activity was a violation and does not waive the rights and processes outlined in paragraphs (c)(4) through (c)(14) of this section or otherwise impact the right of the person to appeal any civil penalty that may be imposed.

(1) In order to begin a proceeding to impose a civil penalty under this paragraph (c), the Deputy Administrator for Defense Nuclear Nonproliferation or his/her designee, shall notify the person by a written notice of violation sent by registered or certified mail to the last known address of such person, of:

- (i) The date, facts, and nature of each act or omission with which the person is charged;
- (ii) The particular provision or provisions of section 57 b. of the AEA, as implemented under this part, involved in each alleged violation;
- (iii) The penalty which DOE proposes to impose;
- (iv) The opportunity of the person to submit a written reply within 30 calendar days of receipt of such preliminary notice of violation showing why such penalty should not be imposed; and
- (v) The possibility of collection by civil action upon failure to pay the civil penalty.

(2) A reply to the notice of violation must:

- (i) State any facts, explanations, and arguments which support a denial of the alleged violation;
- (ii) Demonstrate any extenuating circumstances or other reason why a proposed penalty should not be imposed or should be mitigated;
- (iii) Discuss the relevant authorities which support the position asserted;
- (iv) Furnish full and complete answers to any questions set forth in the notice of violation; and
- (v) Include copies of all relevant documents.

(3) If a person fails to submit a written reply within 30 calendar days of receipt of a notice of violation, the notice of violation, including any penalties therein, constitutes a final decision, and payment of the full amount of the civil penalty assessed in the notice of violation is due 30 calendar days after receipt of the notice of violation. Such failure to submit a reply constitutes a waiver of the rights and processes outlined in paragraphs (c)(4) through (c)(14) of this section.

(4) The Deputy Administrator for Defense Nuclear Nonproliferation or his/her designee, at the written request of a person notified of an alleged violation, may extend in writing, for a reasonable period, the time for submitting a reply.

(5) If a person submits a timely written reply to the notice of violation, the Deputy Administrator for Defense Nuclear Nonproliferation will make a final determination whether the person violated or is continuing to violate a requirement of section 57 b. of the AEA, as implemented under this part. Based on a determination that a person has violated or is continuing to violate a requirement of section 57 b., as implemented under this part, the Deputy Administrator for Defense Nuclear Nonproliferation may issue to that person a final notice of violation that concisely states the violation, the amount of the civil penalty imposed, further actions necessary by or available to the person, and that upon failure to timely pay the civil penalty, the penalty may be collected by civil action. The Deputy Administrator for Defense Nuclear Nonproliferation will send such a final notice of violation by registered or certified mail to the last known address of the person. The amount of the civil penalty will be based on:

- (i) The nature, circumstances, extent, and gravity of the violation or violations;

- (ii) The violator's ability to pay;
 - (iii) The effect of the civil penalty on the person's ability to do business;
 - (iv) Any history of prior violations;
 - (v) The degree of culpability;
 - (vi) Whether the violator self-disclosed the violation;
 - (vii) The economic significance of the violation; and
 - (viii) Such other factors as justice may require.
- (6) Any person who receives a final notice of violation under paragraph (c)(5) of this section may request a hearing concerning the allegations contained in the notice. The person must mail or deliver any written request for a hearing to the Under Secretary for Nuclear Security within 30 calendar days of receipt of the final notice of violation. If the person does not request a hearing within 30 calendar days, the final notice of violation, including any penalties therein, constitutes a final decision, and payment of the full amount of the civil penalty assessed in the final notice of violation is due 45 calendar days after receipt of the final notice of violation.
- (7) Upon receipt from a person of a written request for a hearing, the Under Secretary for Nuclear Security or his/her designee, shall:
- (i) Appoint a Hearing Counsel; and
 - (ii) Forward the request to the DOE Office of Hearings and Appeals (OHA).
- The OHA Director shall appoint an OHA Administrative Judge to preside at the hearing.
- (8) The Hearing Counsel shall be an attorney employed by DOE, and shall have all powers necessary to represent DOE before the OHA.

- (9) In all hearings under this paragraph (c):
- (i) The parties have the right to be represented by a person of their choosing, subject to possessing an appropriate information access authorization for the subject matter. The parties are responsible for producing witnesses on their behalf, including requesting the issuance of subpoenas, if necessary;
 - (ii) Testimony of witnesses is given under oath or affirmation, and witnesses must be advised of the applicability of 18 U.S.C. 1001 and 18 U.S.C. 1621, dealing with the criminal penalties associated with false statements and perjury;
 - (iii) Witnesses are subject to cross-examination;
 - (iv) Formal rules of evidence do not apply, but OHA may use the Federal Rules of Evidence as a guide; and
 - (v) A court reporter will make a transcript of the hearing.
 - (vi) The Administrative Judge has all powers necessary to regulate the conduct of proceedings:
 - (vii) The Administrative Judge may order discovery at the request of a party, based on a showing that the requested discovery is designed to produce evidence regarding a matter, not privileged, that is relevant to the subject matter of the complaint;
 - (viii) The Administrative Judge may permit parties to obtain discovery by any appropriate method, including deposition upon oral examination or written questions; written interrogatories; production of documents or things; permission to enter upon land or other property for inspection and other purposes; and requests for admission;

- (ix) The Administrative Judge may issue subpoenas for the appearance of witnesses on behalf of either party, or for the production of specific documents or other physical evidence;
- (x) The Administrative Judge may rule on objections to the presentation of evidence; exclude evidence that is immaterial, irrelevant, or unduly repetitious; require the advance submission of documents offered as evidence; dispose of procedural requests; grant extensions of time; determine the format of the hearing; direct that written motions, documents, or briefs be filed with respect to issues raised during the course of the hearing; ask questions of witnesses; direct that documentary evidence be served upon other parties (under protective order if such evidence is deemed confidential); and otherwise regulate the conduct of the hearing;
- (xi) The Administrative Judge may, at the request of a party or on his or her own initiative, dismiss a claim, defense, or party and make adverse findings upon the failure of a party or the party's representative to comply with a lawful order of the Administrative Judge, or, without good cause, to attend a hearing;
- (xii) The Administrative Judge, upon request of a party, may allow the parties a reasonable time to file pre-hearing briefs or written statements with respect to material issues of fact or law. Any pre-hearing submission must be limited to the issues specified and filed within the time prescribed by the Administrative Judge;
- (xiii) The parties are entitled to make oral closing arguments, but post-hearing submissions are only permitted by direction of the Administrative Judge;

(xiv) Parties allowed to file written submissions, or documentary evidence must serve copies upon the other parties within the timeframe prescribed by the Administrative Judge;

(xv) The Administrative Judge is prohibited, beginning with his or her appointment and until a final agency decision is issued, from initiating or otherwise engaging in *ex parte* (private) discussions with any party on the merits of the complaint;

(xvi) The Administrative Judge is responsible for determining the date, time, and location of the hearing, including whether the hearing will be conducted via video conference; and

(xvii) The Administrative Judge shall convene the hearing within 180 days of the OHA's receipt of the request for a hearing, unless the parties agree to an extension of this deadline by mutual written consent, or the Administrative Judge determines that extraordinary circumstances exist that require a delay.

(10) Hearings shall be open only to Hearing Counsel, duly authorized representatives of DOE, the person and the person's counsel or other representatives, and such other persons as may be authorized by the Administrative Judge. Unless otherwise ordered by the Administrative Judge, witnesses shall testify in the presence of the person but not in the presence of other witnesses.

(11) The Administrative Judge must use procedures appropriate to safeguard and prevent unauthorized disclosure of classified information or any other information protected from public disclosure by law or regulation, with minimum impairment of rights and obligations under this part. The classified or otherwise protected status of any information shall not, however, preclude its being introduced into evidence. The

Administrative Judge may issue such orders as may be necessary to consider such evidence in camera including the preparation of a supplemental recommended decision to address issues of law or fact that arise out of that portion of the evidence that is classified or otherwise protected.

(12) The person requesting the hearing has the burden of going forward and of demonstrating that the decision to impose the civil penalty is not supported by substantial evidence.

(13) Within 180 days of receiving a copy of the hearing transcript, or the closing of the record, whichever is later, the Administrative Judge shall issue a recommended decision. The recommended decision shall contain findings of fact and conclusions regarding all material issues of law, as well as the reasons therefor. If the Administrative Judge determines that a violation has occurred and that a civil penalty is appropriate, the recommended decision shall set forth the amount of the civil penalty based on the factors in paragraph (c)(5) of this section.

(14) The Administrative Judge shall forward the recommended decision to the Under Secretary for Nuclear Security. The Under Secretary for Nuclear Security shall make a final decision as soon as practicable after completing his/her review. This may include compromising, mitigating, or remitting the penalties in accordance with section 234 a. of the AEA, as amended. DOE shall notify the person of the Under Secretary for Nuclear Security's final decision or other action under this paragraph in writing by certified mail, return receipt requested. The person against whom the civil penalty is assessed by the final decision shall pay the full amount of the civil penalty assessed in the final decision

within 30 calendar days unless otherwise determined by the Under Secretary for Nuclear Security.

(15) If a civil penalty assessed in a final decision is not paid as provided in paragraphs (c) (3), (c)(6) or (c)(14) of this section, as appropriate, the Under Secretary for Nuclear Security may request the Department of Justice to initiate a civil action to collect the penalty imposed under this paragraph in accordance with section 234 c. of the AEA.

(16) The Under Secretary for Nuclear Security or his/her designee may publish redacted versions of notices of violation and final decisions.

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